



## Attorney General of New Mexico

**GARY K. KING**  
Attorney General

**ALBERT J. LAMA**  
Chief Deputy Attorney General

January 13, 2010

Mr. Jeffrey S. Landers, Esq.  
Bernalillo County Attorney Office  
520 Lomas, NW 4<sup>th</sup> Floor  
Albuquerque, New Mexico 87102

Re: Inspection of Public Records Act Complaint – Rosalie Rayburn

Dear Mr. Landers:

Thank you for your November 20, 2009 response on behalf of the County of Bernalillo (the "County") regarding the complaint filed by Ms. Rosalie Rayburn alleging that the County violated the New Mexico Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 through 14-2-12 ("IPRA"). More specifically, Ms. Rayburn alleged that the County violated IPRA by failing to timely respond to her request for inspection and by failing to make available for inspection and copying the report prepared by Dr. T. David Burleigh, metallurgist and corrosion expert, following his inspection of "The Bell Keepers" statue, and Dr. Burleigh's invoice for services provided to the County. I understand that the County has since provided Ms. Rayburn with a copy of Dr. Burleigh's invoice, but denied Ms. Rayburn's request for Dr. Burleigh's report on the grounds that it is a privileged document under the work-product doctrine. I have reviewed Ms. Rayburn's complaint to this Office, your response to our inquiry, and IPRA.

As discussed in more detail below, it appears that the County failed to comply with IPRA in that it did not timely respond to Ms. Rayburn's request for inspection of certain public records. It does not appear, however, that the County violated IPRA when it denied Ms. Rayburn's request to inspect Dr. Burleigh's report documenting his inspection of "The Bell Keepers" statue because Dr. Burleigh prepared the report for the County Attorney in connection with potential litigation. As such, the report was not subject to inspection pursuant to the work-product doctrine.

Failure to Timely Respond to IPRA Request

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Section 14-2-8(D) of IPRA provides in relevant part that:

If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin to run until the written request is delivered to the office of the custodian.

NMSA 1978, § 14-2-8(D) (1993). This provision mandates a three-day response from a public body if the documents requested are not available for immediate inspection.

Ms. Rayburn submitted to Bernalillo County Public Information Officer Liz Hamm an electronic request to inspect and copy Dr. Burleigh's inspection report concerning "The Bell Keepers" statue on September 30, 2009. Section 14-2-8(D) therefore required the County to respond to Ms. Rayburn's request no later than October 5, 2009, three business days after receiving her request. Ms. Hamm did not respond to Ms. Rayburn's request until October 8, 2009, apparently after having consulted the County's legal department.

To avoid potential liability in the future, the County should send out a three-day response letter, whether or not the requested documents are immediately available for inspection. Generally, an adequate three-day response letter should (1) inform the requestor that the requested documents are available for inspection immediately or on date certain, or (2) inform the requestor that the County will need additional time to respond to the request, and (3) acknowledge receipt of the request and inform the requestor when the County will respond to the request. *See Inspection of Public Records Compliance Guide*, Appendix II, Form 11.

#### Denial of Request to Inspect Dr. Burleigh's Report

In response to Ms. Rayburn's request for a copy of Dr. Burleigh's report Ms. Hamm stated that the report "is still in draft format and not yet a public record." *See* October 8, 2009 electronic message from Liz Hamm. Ms. Hamm also stated that "[w]hen the document is finalized, according to legal, it will still be exempt as it is subject to attorney work product protections." Moreover, your November 20, 2009 letter states that the "'draft' report was provided to the County Attorney's Office to provide in analyzing claims and legal strategy with respect to the dispute with the artist." I examine both of these reasons for denying Ms. Rayburn's request in turn.

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IPRA provides that "every person has a right to inspect any public records of this state" and lists certain limited exceptions to this rule. NMSA 1978, § 14-2-1. IPRA defines "public records" as all documents, papers, letters, books, maps, tapes . . . . regardless of physical form or characteristics that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained." NMSA 1978, § 14-2-6(E). Nothing in IPRA limits the definition of public records to documents in their final form. Not only would the final report delivered to the County Attorney be a public record under IPRA, but any draft version of the report also is a public record subject to inspection under IPRA, unless exempted by another provision of law.

IPRA excepts certain public records from inspection, including, for example, records pertaining to medical records of persons confined to any institution, reference letters concerning employment, licensing or permits, law enforcement records that reveal certain confidential information, veteran discharge papers, and as other provided by law. See NMSA 1978, § 14-2-1 (A) (1) through (12). This last exception to the inspection right incorporates limitations on access to public records found in other statutes and sources of legal authority, and a person who requests a particular record may find that it is protected or regulated by a specific statutory or court-recognized rule. See Inspection of Public Records Act Compliance Guide, p. 17 (5<sup>th</sup> ed. 2008).

I agree with your conclusion that Dr. Burleigh's report is excepted from inspection under the attorney work-product doctrine born from NMRA Rule 1-026(B)(4). That rule allows a party to obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial *only* upon a showing that the party seeking the discovery has a substantial need for the materials sought and is unable, without undue hardship, to obtain the materials by other means. See NMRA, Rule 1-026(B)(4).

New Mexico courts deem the protections afforded by the attorney work-product doctrine broader than those afforded under the attorney-client privilege because the former extends beyond the confidential communications between an attorney and a client. See S.F. Pacific Gold Corp. v. UNC, 2007-NMCA-133, ¶ 38, 143 N.M. 215, 228. It also protects documents prepared in anticipation of litigation by or for a party or its representatives, including materials prepared by the attorney's agents and consultants. Id. The attorney work-product doctrine protects an attorney's privacy in doing whatever is necessary to properly advise his client and prepare his case. See id.

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Your response indicates that the County was involved in a legal dispute with the artist who constructed "The Bell Keepers" regarding the artist's warranty obligations and whether the statue contained defects that required repair under the warranty. The County Attorney's Office engaged Dr. Burleigh as expert to conduct a review of the statue in support of the County's factual and legal position. Thereafter, Dr. Burleigh provided a draft report of his findings to the County Attorney's Office to assist your office in analyzing claims and legal strategy with respect to the dispute with the artist. Your response further states that the report was not provided to any third-party or person no subject to the attorney-client or attorney work product privileges. These representations support your conclusion that Dr. Burleigh's report is covered by the attorney work-product doctrine and therefore not subject to inspection under IPRA.

If you have any questions regarding this matter, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Sally Malavé".

Sally Malavé  
Assistant Attorney General

Cc: Ms. Rosalie Rayburn